

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KEENAN KAHL,

Plaintiff,

v.

FREIGHTLINER, LLC, DAIMLER TRUCKS
NORTH AMERICA, LLC, FREIGHTLINER
OF PORTLAND, LLC and WESTERN STAR
TRUCK PLANT PORTLAND, LLC,

Defendants.

Case No. CV 08-739-HU

OPINION AND
ORDER

Benjamin Rosenthal
1023 S.W. Yamhill Street
Suite 200
Portland Oregon 97205

Mitchell J. Cogen
Jennifer Bouman-Steagall
Bullard Smith Jernstedt Wilson
1000 S.W. Broadway, Suite 1900
Portland, Oregon 97205
Attorneys for defendants

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1 HUBEL, Magistrate Judge:

2 Plaintiff Keenan Kahl brings this action against his former
3 employer, Freightliner LLC (nka Daimler Trucks North America LLC),
4 and Freightliner of Portland, LLC (nka Western Star Truck Plant
5 LLC) (collectively, Freightliner). Kahl asserts claims for violation
6 of the federal Family and Medical Leave Act of 1993 (FMLA), 29
7 U.S.C. § 2601 *et seq.* and violation of the Oregon Family Leave Act
8 (OFLA), Or. Rev. Stat. § 659A.150 *et seq.*, as well as a common law
9 claim for wrongful discharge.

10 The complaint alleges that Freightliner unlawfully pressured
11 Kahl to return to work after surgery, before he had fully
12 recuperated; interfered with his ability to take time off for post-
13 surgery physical therapy; informed him that he could return to work
14 early while on post-surgery prescription medication; and terminated
15 him on November 28, 2006, allegedly for working while on
16 prescription medication.¹ Complaint ¶4. Freightliner moves for
17 summary judgment in its favor on all claims.

18 **Factual Background**

19 Kahl worked as an intern at Freightliner while an engineering
20 student at Oregon State University; after graduation, in June 2000,
21 Freightliner employed him first as an entry-level design engineer,
22 then as an entry-level manufacturing engineer. Declaration of Nancy
23 Sheleretis ¶ 3. On August 2, 2004, Kahl started as a production
24 supervisor in the Final Chassis Department of the Portland truck

25
26 ¹ Kahl has withdrawn his allegation that Freightliner
27 interfered with his ability to take time off for post-surgical
28 physical therapy.

1 plant. Id. Kahl then moved to an open position in the Offline
2 Department (Offline) and spent the majority of his time there on
3 swing shift. Id. Trucks are routed from the assembly line to
4 Offline for correction of errors before delivery to the customer.
5 Declaration of Wayne LaRochelle ¶ 5. In September 2006, Offline
6 commenced a graveyard shift. Offline was the only department in the
7 plant running a graveyard shift at the time, and Kahl became a
8 supervisor on that shift. Id. at ¶ 4. Offline is adjacent to the
9 main production facility, but in a separate building. Id. at ¶ 5.

10 Freightliner's company policies are contained in a "Human
11 Resources Manual" available to all employees on the company's
12 website or from the Human Resources (HR) department. LaRochelle
13 Declaration ¶ 6. Kahl has acknowledged that as a supervisor he was
14 responsible for knowing and understanding these policies.
15 Declaration of Mitchell Cogen Exhibit A (Kahl dep.) 152:6-23.
16 Policies relating to medical leave, short term disability, and the
17 drug and alcohol policy are also posted in numerous locations
18 around the plant. LaRochelle Declaration ¶ 6.

19 Freightliner has a Drug and Alcohol Policy (the Policy), with
20 which Kahl was familiar, Kahl dep. 152:24-153:3, and which applies
21 to all employees at the Portland truck plant. LaRochelle
22 Declaration ¶ 9. Among other things, the Policy prohibits being
23 "under the influence of drugs or alcohol" on company premises or
24 during working time. The phrase "under the influence" includes a
25 positive drug or alcohol test; urinalysis levels for nine different
26 categories of drugs are specified. Id. Reporting for duty or
27

1 working while under the influence of any drug or alcohol, whether
2 or not legally intoxicated, is prohibited and "will be cause for
3 suspension without pay or discharge." Id. Prescription drugs are
4 not exempt from the Policy. Id. at ¶ 10. The Policy provides:

5 Employees who are required to take prescription drugs
6 which may influence performance must report such drug
7 usage to management for determination of work capability.
Failure to do so will be cause for disciplinary action,
up to and including suspension without pay or discharge.

8 Id.

9 Although the Policy states that employees taking prescription
10 drugs are required to report to management, at the Portland truck
11 plant such reports were to be made to the Occupational Health Nurse
12 who was on-site at the plant. During the time Kahl was employed,
13 the Occupational Health Nurse at the plant was Rosemary Rasmussen,
14 R.N. Declaration of Rosemary Rasmussen at ¶¶ 2, 6. Rasmussen states
15 in her declaration that the obligation of employees to report
16 prescription drug use to the nurse was "widely and consistently
17 disseminated to all employees." Rasmussen Declaration ¶ 7. She
18 personally created many posters that were put up around the plant,
19 creating new ones on a "fairly regular basis so that employees
20 would not overlook them." Id. at ¶ 7. See also Exhibits B and C
21 (samples of posters). Rasmussen also reminded supervisors of this
22 requirement on an ongoing basis by placing flyers in their
23 mailboxes. Id. at ¶ 8. She states that she is "certain" that she
24 did this during the time Kahl was a supervisor. Id.

25 Supervisors are required to tell the reporting rule to their
26 subordinates. Sheleretis Declaration ¶ 4; LaRochelle Declaration ¶

1 11; Declaration of Timothy Kelsey ¶ 7. The Policy was strictly
2 enforced, and posters throughout the plant informed employees that
3 they were required to report prescription drug use to the nurse.
4 Declaration of Jeffrey Dawley ¶ 9, Declaration of Timothy Kelsey ¶
5 7, Sheleretis Declaration ¶ 4.

6 Freightliner's exempt employees, such as Kahl, were eligible
7 for short term disability benefits in the form of payroll
8 continuation for up to 60 calendar days upon receiving personal
9 medical leave. LaRochelle Declaration ¶ 7. Kahl was eligible for
10 and received such benefits for his medical leave in 2006. Id. The
11 short term disability policy requires that upon return from medical
12 leave, employees must present a doctor's note indicating that they
13 are released to return to work. LaRochelle dep. 41:8-17.

14 In June 2006, Kahl was a production supervisor in Offline on
15 the swing shift. Kahl dep. 129:22-25; LaRochelle Declaration ¶ 8.
16 On Thursday, June 22, Kahl and another supervisor went out in the
17 evening and ingested numerous drugs, including cocaine,
18 benzodiazepines, and marijuana. Kahl dep. 173:1-174:1; Cogen
19 Declaration ¶ 8, Exhibit F (deposition Exhibit 11). Kahl stayed up
20 all night and reported for work on the plant floor on the afternoon
21 of June 23. Kahl dep. 170:9-13. The other supervisor obtained an
22 excused absence from work.

23 Manager Rick Oliver saw Kahl at about 6:00 p.m., and observed
24 that Kahl seemed to be having difficulty staying awake. Oliver
25 Declaration ¶ 5. About an hour later, Oliver saw Kahl again and
26 recognized that he was impaired; he sent Kahl to his office. Kahl
27

1 was slurring his words and could not sit still. Id. at ¶ 6. Kahl
2 was sent home and told to report for a urinalysis. Id. at ¶ 6.

3 On June 26, 2006, Kahl reported for a urinalysis, where he
4 told Karla Steffenson, the medical assistant working under
5 Rasmussen, that he had prescriptions for Percocet (trade name for
6 oxycodone, an opiate), Vicodin (trade name for hydrocodone, an
7 opiate and acetaminophen),² and Xanax (a benzodiazepine). Kahl dep.
8 175:16-23. The urinalysis was positive for cocaine,
9 benzodiazepines, and marijuana. Steffenson Declaration ¶ 5. Before
10 that time, Kahl had not informed anyone in the nursing station that
11 he was taking prescription medications. Id. at ¶ 6; Rasmussen
12 Declaration at ¶ 11.

13 Reporting prescription drug use as a result of being called in
14 for a random urinalysis does not satisfy the Policy notification
15 requirement, because the intent of the Policy is determination of
16 work capability and accident prevention. Steffenson Declaration ¶
17 12. To determine work capability, the nursing staff determines the
18 dosage, schedule, frequency, duration of anticipated use, and other
19 factors or drugs that may interact with the reported prescription
20 drug. This does not occur with an employee report during the
21 urinalysis process, id., at least not for work that day. It is
22 unclear whether this purpose is met by such a report for the
23 future.

24 The same day as the urinalysis, Freightliner gave Kahl a
25 referral to Freightliner's Employee Assistance Plan (EAP) and
26

27 ² See footnotes 3 and 4 below.

1 placed him on medical leave. LaRoche Declaration ¶ 13. Kahl saw
2 Stacy Young, LCSW, who referred Kahl to two other practitioners, a
3 psychiatrist, Thomas Dotson, M.D., and a substance abuse treatment
4 center, Northwest Chemical Dependency. Cogen Declaration ¶ 9,
5 Exhibit G. Plaintiff remained on leave for a few weeks, receiving
6 full pay under the Short Term Disability policy. LaRoche
7 Declaration ¶ 14.

8 On July 10, 2006, Kahl's gastroenterologist, Joseph Parent,
9 M.D., noted that Kahl "wants meds which are habit-forming." Cogen
10 Declaration Exhibit G 50:18-20. They were not prescribed.

11 On July 11, 2006, Kahl went to the nursing station for another
12 urinalysis. Steffenson Declaration ¶ 7; Cogen Declaration ¶ 8,
13 Exhibit F (deposition exhibit 12). Under the Policy guidelines,
14 Kahl was required to test negative before returning to the
15 workplace. LaRoche Declaration ¶ 14. Kahl said he was taking
16 Xanax and Seroquel. Steffenson Declaration ¶ 7; Cogen Declaration
17 ¶ 8, Exhibit F (deposition exhibit 12). The initial test was
18 positive for benzodiazepines, but a confirmation test from Legacy
19 Metrolab, received July 14, 2006, indicated that the presence of
20 the drugs was within acceptable limits. Steffenson Declaration ¶ 8;
21 Cogen Declaration ¶ 8, Exhibit F (deposition exhibit 13).

22 On July 13, 2006, pursuant to Freightliner policy, Kahl
23 entered into a standard Last Chance Agreement (LCA) that is
24 required as a condition of reinstatement or continued employment
25 following a positive drug screen at work. LaRoche Declaration ¶
26 15; Cogen Declaration ¶ 8, Exhibit F (deposition exhibit 15).

1 LaRochelle, Human Resources manager, reviewed the LCA with Kahl
2 before Kahl signed it. LaRochelle Declaration ¶ 15; Cogen
3 Declaration ¶ 8, Exhibit F (deposition exhibit 15). Under the terms
4 of the LCA, Kahl agreed, in part:

5 * * *

6 2. I understand that upon return to the workplace I
7 must meet all established standards of conduct and
8 job performance and that I will be subject to the
9 company's disciplinary procedures for any failure
10 to meet the standards.

11 3. I understand that I may be subjected to a drug screen or
12 alcohol test at any time that this letter agreement is in
13 effect and failure to take the test or a positive result
14 will be cause for discharge.

15 * * *

16 I understand and agree that my employment is contingent upon
17 my meeting satisfactorily all of the above terms and failure
18 to do so subjects me to immediate termination of employment
19 with Freightliner LLC. These conditions are in addition to the
20 Company's right to alter or end the employment relationship
21 for reasons not contained herein.

22 LaRochelle Declaration ¶ 15; Cogen Declaration ¶ 8, Exhibit F
23 (deposition exhibit 15).

24 Dr. Parent wrote that on July 25, 2006, Kahl asked repeatedly"
25 for Oxycontin and Vicodin for elbow and knee pain, but Dr. Parent,
26 noting that Kahl had "asked before," declined to give it. Cogen
27 Declaration Exhibit G 55:22-25.

28 On July 11, July 17, and August 15, 2006, Kahl submitted to
random urinalysis, as all employees on LCAs are required to do.
Sheleretis Declaration ¶ 7. Kahl stated that he was not taking any
prescription medications and tested negative or within acceptable
limits for all screened substances. Steffenson Declaration ¶ 7;
Cogen Declaration ¶ 8, Exhibit F (deposition exhibit 20).

1 Kahl has testified that sometime in August 2006, he decided to
2 schedule knee surgery with Dr. O'Shea. Kahl dep. 237:4-14. Kahl
3 testified that when he discussed the surgery with Dr. O'Shea, Dr.
4 O'Shea told him he would be "bedridden for 10 days to two weeks,"
5 and "then from there, minimal walking, crutches, no running around
6 for ... another extended period," then slow jogging for three to
7 four months-in total, a "six month healing process." Id. at 237:15-
8 25. Kahl testified that he knew how long he would be off work
9 before asking Dr. O'Shea, because he had had the same surgery on
10 the other knee. Id. at 238:2-11. Kahl testified that he understood
11 that he would be off work for "three weeks, a month." Id. at 12-15.

12 On September 27, 2006, Kahl gave the nursing station a note
13 from his physician, John O'Shea M.D., stating that Kahl was
14 scheduled for right knee surgery on October 13, 2006. Rasmussen
15 Declaration ¶ 9; Cogen Declaration ¶ 8, Exhibit F (deposition
16 exhibit 21). Kahl asserts that between September 27, 2006 and
17 October 13, 2006, no one at Freightliner informed Kahl of his right
18 to take medical leave under OFLA or FMLA and no one gave him any
19 written information about his rights and obligations under those
20 statutes. Kahl Declaration ¶ 2. He did not know of the right to
21 take intermittent leave. Id. He was not told that he needed a
22 Certification of Health Care Provider, Fitness for Duty
23 Certificate, or a release to return to work. Id.

24 Rasmussen was the person responsible for processing all
25 medical documents relating to leave, and she has acknowledged that
26 the failure to provide Kahl with FMLA rights and obligations
27

1 documents was due to an error on her part. Rasmussen dep. 38:23-
2 39:9; 51:4-20. Neither Rasmussen nor Freightliner identifies the
3 forms Rasmussen would have given Kahl had she not made this error.
4 Likewise, the record does not show whether Kahl had all the
5 information that would have been provided on the documents
6 Rasmussen "should have" provided despite her mistake. In any event,
7 Freightliner gave Kahl medical leave for the surgery. Declaration
8 of Geoff Jansen ¶ 5.

9 On the morning of the surgery, October 13, 2006, Kahl sent
10 LaRochelle and other employees an e-mail stating that he would be
11 "out effective this morning for a week." Kahl dep. 240:22-241:2;
12 LaRochelle Declaration ¶ 16; Cogen Declaration ¶ 8, Exhibit F
13 (deposition exhibit 22).

14 On October 13, 2006, Dr. O'Shea prescribed Kahl 30 tablets of
15 oxycodone³ (trade names Oxycontin and Percocet). Supplemental Cogen
16 Declaration, Exhibit E p. 3. On October 14, 2006, Dr. O'Shea gave
17 Kahl a prescription for another 40 tablets of oxycodone. Id. at p.
18 7. On October 16, Kahl saw Dr. O'Shea. Cogen Declaration ¶ 11,
19 Exhibit I, p. 1. Dr. O'Shea noted that Kahl was being noncompliant
20 with his postoperative instructions, not keeping his knee elevated
21 and bearing weight. Id. However, the wound appeared benign except
22 for some mild bruising, the knee was neurovascularly intact, with
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24 ³Oxycodone is the generic name for an opioid analgesic. The
25 trade names of drugs containing oxycodone include Oxycontin,
26 Roxicodone (oxycodone hydrochloride), Percocet (oxycodone and
27 acetaminophen), Percodan (oxycodone and acetaminophen), and
Combunox (oxycodone and ibuprofen). See
<http://www.rxlist.com/oxycodone-drug.htm>.

1 full extension and approximately 100 degrees of bend, and stable.
2 Id. Dr. O'Shea wrote that Kahl was "requesting another prescription
3 for pain medications," but because he appeared "with a somewhat
4 altered mental state and slurred speech," Dr. O'Shea did not give
5 him one. Id.

6 On October 17, 2006, four days after surgery, Kahl told Dr.
7 O'Shea's staff he was "mentally ready to return to work," and that
8 he had "not taken any pain meds today and he has had full range of
9 motion." Cogen Declaration ¶ 8, Exhibit F, p. 11 (deposition
10 exhibit 24). The doctor's office recommended that Kahl stay out of
11 work at least until his sutures were removed at his scheduled
12 follow up visit on October 26. Id. Kahl told the office he
13 preferred to have his sutures removed by Dr. O'Shea at an
14 appointment on November 2. Id.

15 Kahl has testified that after October 17, 2006, "I went as
16 hard as I could not to take pain meds. I just toughed it out." Kahl
17 dep. 265:6-10. Kahl stated, "I remember not taking pain meds until
18 the day I went back to work and I got hurt." Id. at 265:9-11.

19 On October 20, 2006, Kahl presented at the Providence Portland
20 Medical Center with what appeared to be minor cellulitis in his
21 knee. Rosenthal Declaration, ¶ 3, Exhibit B (deposition exhibit
22 28). Kahl stated that he was currently on Xanax and oxycodone; the
23 admitting physician, Todd Buerk, M.D., gave him another
24 prescription for both. Id. However, Kahl testified that he "stopped
25 taking the pain medication and the anxiety medication fairly
26 quickly. ... I toughed it out as much as I could until I went back
27

1 to work." Kahl dep. 273:13-24. Kahl testified that he stopped
2 taking Vicodin "a week or so" after the surgery. Id. at 274:1-4.

3 On October 23, 2006, Kahl asked Dr. Parent, for oxycodone or
4 Xanax; when Dr. Parent declined, Kahl said he could "get it another
5 way." Cogen Declaration, Exhibit G 48:21-24.

6 Kahl and Jansen spoke regularly on the telephone while Kahl
7 was on leave. Jansen Declaration ¶ 6. According to Kahl, his
8 prognosis after surgery was bed rest for 10 days to two weeks and
9 then minimal walking with recovery after three to four months. Kahl
10 dep. 237:15-25; 238:12-15. Also according to Kahl, Dr. O'Shea told
11 him he would be off work for a month to six weeks, after which he
12 would be restricted to limited duties. Id. at 259:18-260:1; 262:25-
13 263:6. Kahl testified that Jansen wanted him to return sooner, and
14 asked Kahl "what was the minimal amount of time" he needed off,
15 that he was needed, and "what it was going to take to come back."
16 Id. at 260:3-11; 279:2-280:1. Kahl has testified that during his
17 first week after surgery, Freightliner employees called him for
18 direction. Kahl dep. 258:9-17. Kahl felt pressured to return to
19 work. Id. at 284:3-9.

20 According to Kahl's testimony, during his medical leave
21 between October 13 and October 29, 2006, Kahl advised Jansen "of
22 the prescriptions that I may need to take in the event I do have
23 some problems," and that "I may have to take Vicodin or an anti-
24 inflammatory." Kahl dep. 281:14-25. However, Kahl also testified,
25 "I didn't tell them I was taking it." Id. at 281:23-25. (Emphasis
26 added).

1 Kahl told Jansen that in order to return to work he needed to
2 stay off his feet as much as possible and ice his knee when
3 necessary. Jansen Declaration ¶ 7. Kahl requested a cart and
4 access to ice. Id. Jansen agreed, id., and Kahl agreed to return to
5 work for the graveyard shift on Sunday, October 29, 2006. Kahl
6 dep. 280:14-281:8. This was 17 days after his surgery, and he had
7 not yet been released by Dr. O'Shea. Id. at 288:17-20. When Kahl
8 went to work that Sunday night, the entire plant was shut down
9 except for the Offline department and Kahl was the only management
10 person in the plant. Jansen Declaration ¶ 8.

11 According to Jansen, a cart was brought to the Offline area
12 and left outside the door. Jansen Declaration ¶ 9. An ice machine
13 and gel cold packs were located in the nursing station, which is
14 kept unlocked. Id. at ¶ 10. However, Kahl asserts that no cart was
15 available to him and that the nursing station was locked, so that
16 he could not get to the ice. Kahl dep. 284:13-16; 286:1-6. Kahl
17 left work early. Id. at 286:16-17.

18 On Monday morning, October 30, 2006, Kahl complained to Jansen
19 about the absence of a cart and ice. Jansen Declaration ¶ 11. As
20 Kahl has acknowledged, a cart and ice were available from then on.
21 Kahl dep. 287:8-23. According to employee Jeffrey Dawley, during
22 the first few days after Kahl returned to work, he was always
23 driving a cart when he was on the shop floor. Dawley Declaration ¶
24 4.

25 On two occasions that Monday morning, Jansen told Kahl to
26 inform the nurse about any prescription painkillers that he might
27

1 be taking. Jansen Declaration ¶ 13. According to Rasmussen and
2 Steffenson, he did not do so. According to Rasmussen and
3 Steffenson, Kahl did not mention any prescription medications to
4 Steffenson or Rasmussen before November 21, 2006. Rasmussen
5 Declaration ¶¶ 10, 11; Steffenson Declaration ¶¶ 10, 11. Kahl has
6 testified that Steffenson "knew I possibly could be on Vicodin⁴
7 when I came in after my surgery and told her" "that I may be on
8 it," and that "I have a prescription and I may need to take it as
9 needed." Cogen Reply Declaration Exhibit B, Kahl dep. 303:17-
10 304:18. Kahl acknowledges that he started taking Vicodin for pain
11 relief after returning to work. Kahl dep. 265:6-15; 274:1-15;
12 275:7-18; 276:14-277:4.

13 On November 2, 2006, Kahl returned to Dr. O'Shea for his
14 scheduled follow-up. Chart notes for that day indicate that Kahl
15 was "doing well," with "wounds healed" and that Kahl had been given
16 a copy of his "OP Report." Cogen declaration ¶ 11, Exh. I, p. 3.
17 That day Kahl gave LaRochelle and Steffenson 1) a return to work
18 slip from Dr. O'Shea with the limitation of "minimal walking," and
19 a follow-up date of December 14, 2006; and 2) a one-page
20 "operations/procedure report" from Providence Portland Medical
21 Center about Kahl's surgery. Steffenson Declaration ¶ 10; Cogen
22 Declaration Exhibit I, p. 4, 5. No mention of prescription

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24 ⁴ Vicodin is a trade name for a combination of the generic
25 drugs hydrocodone bitratartrate and acetaminophen. See
26 <http://www.rxlist.com/vicodin-drug.htm>. Hydrocodone is an opioid
27 analgesic. Brand name drugs containing hydrocodone include
Lortab, Norco, Vicoprofen, and Zydone. Id. Hydrocodone is a
Schedule II controlled opioid agonist. Id.

1 medications appears on either page.⁵

2 On November 21, 2006, in accordance with company policy,
3 Sheleretis sent a list to the nursing station of all employees then
4 on LCAs with instructions to perform random urinalysis tests on
5 them. Sheleretis Declaration ¶ 7; Steffenson Declaration ¶¶ 4, 11.
6 LaRochelle told Oliver to bring Kahl to the nursing station for a
7 random urinalysis when he came in. Oliver Declaration ¶ 8; La
8 Rochelle Declaration ¶ 19. At about 10:30 or 11:00 p.m., Oliver
9 located Kahl on the shop floor and escorted him to the nursing
10 station. Oliver Declaration ¶ 8. As she filled out the standard
11 chain of custody form, Steffenson asked Kahl whether he was taking
12 any prescription or over the counter medications. Steffenson
13 Declaration ¶ 11; Cogen Declaration ¶ 8, Exhibit F (deposition
14 exhibit 31). Kahl said he was taking ibuprofen and Vicodin.
15 Steffenson asked about Kahl's use of Vicodin, and Kahl said he last
16 took some that day at about 9:00 a.m. Steffenson noted this on top
17 of the chain of custody form. Steffenson Declaration ¶ 11; Cogen
18 Declaration ¶ 8, Exhibit F (deposition exhibit 31). According to
19 Steffenson, Kahl had not previously informed her that he was taking

21
22 ⁵ Kahl testified at his deposition that he believed he gave
23 Freightliner "Exhibit 28," which is the emergency room report
24 from Dr. Buerk dated October 26, 2006. Kahl characterized this
25 document as "my postop report," and stated that it listed all his
26 medications. Cogen Declaration Exhibit B, Kahl dep. 296:2-7.
27 Exhibit 28 is not a "postop" report. The "OP Report" provided by
28 Dr. O'Shea is Cogen Exhibit I, p. 5. It does not mention
medications. Moreover, this exhibit does not indicate that Kahl
was taking Vicodin (hydrocodone); it states only that Kahl is
currently taking oxycodone and Dr. Buerk gave Kahl another
prescription for oxycodone.

1 Vicodin, or any other prescription medication. Steffenson checked
2 to see whether Kahl had informed Rasmussen about his use of
3 prescription drugs, but the "Current Medications" portion of the
4 OHM⁶ was blank, which indicated that he had not. Steffenson
5 Declaration ¶ 6; Rasmussen Declaration ¶ 11, Exhibit F.

6 Initial screening of Kahl's November 21, 2006 urinalysis
7 indicated the presence of morphine and benzodiazepines. Steffenson
8 Declaration ¶ 12; Cogen Declaration ¶ 8, Exhibit F (deposition
9 exhibit 31). Steffenson contacted Oliver and told him Kahl's
10 urinalysis was initially positive, but that the sample needed to be
11 sent to a laboratory for confirmation. Steffenson Declaration ¶ 13;
12 Oliver Declaration ¶ 9. Oliver told Kahl to go home and await the
13 results of the laboratory confirmation. Oliver Declaration ¶ 9.

14 On November 28, 2006, the laboratory confirmation indicated
15 that Kahl tested positive for hydrocodone and hydromorphone,
16 consistent with ingestion of Vicodin. Steffenson Declaration ¶ 14;
17 Cogen Declaration ¶ 8, Exhibit F (deposition exhibit 31). According
18 to the Declaration of C. Kirby Griffin, M.D., who reviewed the test
19 results from Kahl's sample collected November 21, 2006, oxycodone
20 and hydrocodone are distinguishable from one another in the
21 testing, and Kahl's results showed that he had ingested
22 hydrocodone, but not oxycodone. Griffin Declaration ¶¶ 2-7, Exhibit
23 A. Kahl acknowledges that Dr. O'Shea prescribed oxycodone, not
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25 ⁶ OHM was an occupational health software system accessible
26 only to the nursing station. OHM contains a tab for "Current
27 Medications," under which any information reported by employees
about prescription drug usage was entered. Rasmussen Declaration
28 ¶ 11. See also id. at Exhibit F (screen print from OHM for Kahl).

1 hydrocodone, but asserts that on November 21, 2006, he had taken
2 Vicodin that was left over from earlier prescriptions given to him
3 on May 18, 2006, May 26, 2006, and July 30, 2006.⁷

4 LaRochelle and Paul Erdy, the plant manager, discussed the
5 results and decided to discharge Kahl for violation of the Policy
6 and of his LCA. LaRochelle Declaration ¶ 20; Erdy Declaration ¶ 6.
7 LaRochelle sent Kahl a termination letter that day. LaRochelle
8 Declaration ¶ 20; Cogen Declaration ¶ 8, Exhibit F (deposition
9 exhibit 34).

10 **Standard**

11 A party is entitled to summary judgment if the "pleadings,
12 depositions, answers to interrogatories, and admissions on file,
13 together with affidavits, if any, show there is no genuine issue as
14 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is
15 not proper if material factual issues exist for trial. Warren v.
16 City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A genuine
17 dispute arises "if the evidence is such that a reasonable jury
18 could return a verdict for the nonmoving party." State of
19 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). Where
20 the record taken as a whole could not lead a rational trier of fact
21 to find for the non-moving party, there is no genuine issue for
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23 ⁷ The three prescriptions were obtained from three different
24 physicians: Karen O'Neill, M.D., an emergency room doctor at
25 Legacy Mt. Hood Medical Center in Gresham; Janice Miller, M.D.,
26 an internist at Westside Internal Medicine on Barnes Road in
27 Portland; and Timothy Zeigler, M.D., an emergency medicine doctor
at Legacy Good Samaritan in Portland. Each of the three
prescriptions was filled at a different pharmacy. Supplemental
Cogen Declaration ¶¶ 3-4, Exhibits B, C.

1 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
2 574, 587 (1986).

3 On a motion for summary judgment, the court must view the
4 evidence in the light most favorable to the non-movant and must
5 draw all reasonable inferences in the non-movant's favor. Clicks
6 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir.
7 2001). The court may not make credibility determinations or weigh
8 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55
9 (1990). "Credibility determinations, the weighing of the evidence,
10 and the drawing of legitimate inferences from the facts are jury
11 functions, not those of a judge." Reeves v. Sanderson Plumbing
12 Products, Inc., 530 U.S. 133, 150 (2000). Where different ultimate
13 inferences may be drawn, summary judgment is inappropriate.
14 Sankovich v. Ins. Co. of N. Am., 638 F.2d 136, 140 (9th Cir. 1981).

15 Discussion

16 1. FMLA/OFLA claims

17 Kahl asserts that Freightliner interfered with his exercise of
18 FMLA and OFLA rights by discouraging him from taking medical leave,
19 and then improperly encouraging to return to work before he was
20 medically able to do so; failing to provide him documentation
21 related to his FMLA/OFLA rights, which would have resulted in
22 Kahl's putting Freightliner on notice that he was taking
23 prescription pain medication and precluded his termination; and
24 misleading him into believing he could return to work while taking
25 pain medication, then terminating him for taking that medication.
26 Freightliner challenges these claims.

1 FMLA prohibits interference with the exercise of the
2 employee's right to take leave. 29 U.S.C. § 2615(a). "It shall be
3 unlawful for any employer to interfere with, restrain, or deny the
4 exercise of or the attempt to exercise, any right provided under
5 this title [and subchapter]." 29 U.S.C. § 2615(a)(1). Under
6 Department of Labor (DOL) implementing regulations for FMLA, any
7 violation of FMLA itself or of the DOL regulations constitutes
8 interference with an employee's rights under FMLA. 29 C.F.R. §
9 825.220(b). The DOL interprets "interference" to include "not only
10 refusing to authorize FMLA leave, but discouraging an employee from
11 using such leave." Id. The regulations specify one form of employer
12 interference--i.e., "employers cannot use the taking of FMLA leave
13 as a negative factor in employment actions." 29 C.F.R. §
14 825.220(c).

15 OFLA is "construed to the extent possible in a manner that is
16 consistent with" FMLA. Or. Rev. Stat. § 659A.186(2). Neither party
17 has directed the court to any differences, for purposes of this
18 case, between the federal and state statutes, so a single analysis
19 of both claims suffices.

20 Kahl contends that Jansen asked him to postpone the surgery
21 because Offline was adding a third shift, and that Erdy asked him
22 to postpone his surgery until March 2007.⁸ Kahl asserts that during
23 the time he was on leave, Jansen encouraged him to return to work
24 as soon as possible, and told him he could return to work while

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26 ⁸According to Kahl's evidence, the surgery was elective, to
27 correct a problem he had had for several years. Rosenthal
28 Declaration ¶ 2.

1 still taking prescription medication. See Complaint ¶ 4; Kahl dep.
2 230:13-232:4; 238:24-239:8, 259:18-260:3-11, 261:4-16, 279:2-280:1.
3 Kahl testified that he felt pressured to return to work. Id. at
4 284:3-9. Freightliner contends that taking these allegations as
5 true fails to establish that Freightliner interfered with Kahl's
6 FMLA and OFLA rights.

7 Freightliner argues that Kahl was obligated under FMLA and
8 OFLA to consult with Freightliner about the surgery, to make a
9 reasonable effort to schedule his leave so as not to disrupt unduly
10 Freightliner's operations, and to work out a schedule that suited
11 the needs of Kahl and Freightliner, see 29 U.S.C. § 2612(e)(2), 29
12 C.F.R. § 825.302(e), OAR 839-009-0260(9). According to
13 Freightliner, it follows that Freightliner was legally permitted to
14 discuss with Kahl the anticipated length of his leave and its
15 potential impact on Freightliner. Freightliner granted Kahl medical
16 leave on the date requested. Kahl returned to work voluntarily upon
17 conclusion of his leave, and received all other FMLA and OFLA
18 related rights and benefits, including being immediately restored
19 to his former position.

20 Freightliner asserts that Kahl's subjective feeling that he
21 was "pressured" to return to work is not supported by any evidence
22 that Kahl complained of such pressure, that he was medically unfit
23 to return when he did, or that he returned to work unwillingly. In
24 fact, Kahl himself testified that it was "important" to him to "try
25 and get back to work as quick as possible." Kahl dep. 238:6-8.
26 Freightliner has proffered the email in which Kahl stated his
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1 intention to be out a week for knee surgery, and the fact that Kahl
2 did in fact agree to return to work approximately two weeks after
3 his surgery. LaRochelle Declaration ¶ 16; Kelsey Declaration ¶ 4;
4 Kahl dep. 280:22-281:8; 282:18-283:2. Freightliner has produced
5 evidence from Kahl's friends at work that upon returning to
6 Freightliner, Kahl told them he was ready to go back to work, and
7 that he never complained about his knee or gave any indication that
8 he didn't want to be there. Timothy Kelsey stated that Kahl seemed
9 "very excited to be back," and Jeffrey Dawley testified that Kahl
10 roughhoused with him at work shortly after his surgery. Declaration
11 of Timothy Kelsey ¶¶ 3-6; Declaration of Jeffrey Dawley ¶¶ 5-8.

12 Freightliner also points to the evidence that Kahl saw his
13 surgeon, Dr. O'Shea on November 2, 2006, three days after returning
14 to Freightliner, and said nothing to indicate that he was returning
15 to work reluctantly. Kahl testified that he told Dr. O'Shea, "Hey,
16 I'm going back to work. Can I get a note?" Cogen Reply Declaration
17 Exhibit B, Kahl dep. 289:15-18. Dr. O'Shea's chart notes do not
18 suggest that either he or Kahl had any concerns about Kahl's
19 returning to work, and Dr. O'Shea released him with only "minimal
20 restrictions." Cogen Declaration Exhibit I.

21 I conclude that on this record, a reasonable juror could find
22 that Kahl's supervisors initially discouraged him from taking
23 medical leave, then took actions that made Kahl feel pressured to
24 return to work early, with the misimpression that his supervisor
25 had given him permission to return while taking prescription
26 painkillers so long as he reported their use.

1 Kahl asserts that Freightliner interfered with his FMLA/OFLA
2 rights when Rasmussen and Steffenson failed to provide him with
3 documentation informing him of his FMLA rights and obligations,
4 specifically documentation advising Kahl of the need for a
5 Certification of Health Care Provider, Fitness for Duty
6 Certificate, or a return to work release.

7 With the choice of submitting any of these three forms, Kahl
8 argues that if Freightliner had provided him a "Certification of
9 Health Care Provider," which asks whether the employee is required
10 to take prescription medication, see Rosenthal Declaration Exhibit
11 F, p. 12, then Kahl would have had his doctor complete the form
12 disclosing Kahl was on Vicodin, putting Freightliner on notice that
13 Kahl was on prescription pain medication.⁹

14 Freightliner has acknowledged that it failed to provide Kahl
15 with documentation informing him of his FMLA rights and obligations
16 at the time he took leave. The evidence does not show what
17 documents Freightliner would have given to Kahl absent Rasmussen's
18 mistake. Kahl has submitted a packet of documents, including forms,
19 which he asserts Freightliner should have provided, either pursuant
20 to federal regulations or perhaps Freightliner policy, including a
21 a Certification of Health Care Provider.

22 While a Certification of Health Care Provider is not among the
23 documents that an employer is *required* to provide to an employee

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25 ⁹Dr. O'Shea would not have identified the pain killer as
26 Vicodin (hydrocodone), as argued by Kahl, but as oxycodone, which
27 Dr. O'Shea had prescribed. A jury may or may not forgive the
confusion over which prescription pain medication Kahl argues Dr.
O'Shea would have mentioned.

1 taking FMLA leave, see 29 C.F.R. § 825.300(c)(3) ("The notice of
2 rights and responsibilities may be accompanied by any required
3 certification form.") an employer may request that a Certification
4 of Health Care Provider be provided with respect to an employee's
5 leave. See 29 C.F.R. § 825.305(a) (employer may require that an
6 employer's request for leave be "supported by a certification
7 issued by the health care provider of the employee.") (emphasis
8 added).

9 Freightliner has proffered evidence that it did not require
10 medical certification to support FMLA leave in all circumstances.
11 Rasmussen Reply Declaration ¶ 3; Steffenson Reply Declaration ¶ 3.
12 According to a human resources policy document that was given to
13 Kahl, see Rosenthal Declaration ¶ 5, Exhibit D,

14 [w]ritten verification may be required from the treating
15 physician to substantiate leave taken under this policy.
16 ... Where written verification by the treating physician
17 will be required prior to commencement of the leave, an
18 employee will be notified in writing by the company
19 within three working days of the receipt of the request.

20 Human Resources Manual, Procedure Number 311. Since Rasmussen
21 neither provided the FMLA forms to Kahl, nor identified which forms
22 she would normally have provided, there is a genuine issue of
23 material fact on whether the usual Freightliner forms would have
24 caused Kahl to disclose he was taking prescription pain medication
25 on the required form(s).

26 Kahl also points to Freightliner's failure to provide him with
27 a Fitness for Duty certificate, asserting that when he returned to
28 work on the night of October 29-30, 2006, Jansen knew Kahl did not
have a written release from his doctor. Kahl dep. 288:17-20. Kahl

1 argues that if Freightliner had obtained a Fitness for Duty
2 certificate from Kahl before he returned to work, Freightliner
3 would have been on notice that Kahl could not perform the essential
4 elements of his position and therefore would not have allowed him
5 to return to work.

6 The FMLA fitness for duty regulation, 29 C.F.R. § 825.313(d)
7 provides:

8 When requested by the employer pursuant to a uniformly
9 applied policy for similarly-situated employees, the
10 employee must provide medical certification, at the time
11 the employee seeks reinstatement at the end of FMLA leave
12 taken for the employee's serious health condition, that
13 the employee is fit for duty and able to return to work
14 (see § 825.312(a)) if the employer has provided the
15 required notice (see § 825.300(e)); the employer may
16 delay restoration until the certification is provided.
17 Unless the employee provides either a fitness for duty
18 certification or a new medical certification ... at the
19 time FMLA leave is concluded, the employee may be
20 terminated.

21 Freightliner did not receive a fitness for duty certification from
22 Dr. O'Shea until November 2, 2006. Cogen Declaration Exhibit I. Dr.
23 O'Shea states that Kahl can return to work as of November 2, 2006,
24 with a restriction of "minimal walking." Id. The certification from
25 Dr. O'Shea made no reference to Vicodin or other pain medication.
26 The document does not explicitly state that Kahl is unable to
27 perform the functions of his job, but a jury could reasonably
28 conclude that the restriction to "minimal walking" might have
suggested that Kahl was not able to perform the functions of his
job.

Kahl also asserts that Freightliner is equitably estopped from
terminating him for testing positive for Vicodin in violation of

1 his LCA, because Kahl returned to work early in reliance upon
2 Jansen's representation that he could return to work on
3 prescription medication. Kahl argues that had he known he could not
4 return to work while taking medication, he would not have done so.

5 Kahl has testified that Steffenson "knew I possibly could be
6 on Vicodin when I came in after my surgery and told her" "that I
7 may be on it," and that "I have a prescription and I may need to
8 take it as needed." While Freightliner denies that Kahl reported to
9 the nursing station that he was taking Vicodin, a juror could
10 believe Kahl and find that his statement to Steffenson about
11 possibly being on Vicodin should have triggered the same sort of
12 inquiry by her that a more unequivocal report would have triggered.
13 Given Freightliner's admission that Rasmussen and Steffenson failed
14 to provide FMLA rights and responsibilities notice when Kahl went
15 out on leave, a jury could conclude that Steffenson failed to note
16 the information Kahl says he reported to her, or failed to make an
17 appropriate inquiry in response to Kahl's equivocal alleged report
18 to her of drug use.

19 Kahl has created a genuine issue of material fact on whether
20 he was pressured to return to work before he was medically
21 stationary, whether he informed Freightliner that he was taking
22 Vicodin for post-surgical pain before he tested positive for it on
23 November 2, 2006, and whether Freightliner would have required Kahl
24 to submit a Certification of Health Care Provider before going on
25 leave that would have informed Freightliner he would be on
26 prescription pain medication. Certainly, the factfinder will be

1 faced with the discrepancies regarding which drugs were prescribed
2 when, by which doctors, and for what conditions, and the evidence
3 of Kahl's drug seeking behavior. But a jury could reasonably
4 conclude that Kahl might have been confused about whether he had
5 been prescribed or was taking hydrocodone or oxycodone. While one
6 might predict that the jury's credibility determination between
7 Kahl, his supervisors, and Steffenson would be favorable to
8 Freightliner, I cannot say that no reasonable juror could find in
9 Kahl's favor. Now is not the time to weigh the evidence.
10 Accordingly, Freightliner's motion for summary judgment on this
11 claim is denied.

12 2. Wrongful discharge

13 Kahl asserts that he was wrongfully discharged in retaliation
14 for exercising his FMLA/OFLA rights. Kahl has the burden of showing
15 a "causal connection" between the protected activity and his
16 termination. Shockey v. City of Portland, 313 Or. 414, 422 (1992).
17 In other words, he must produce evidence that his protected
18 activity in taking leave was a "substantial factor" in
19 Freightliner's decision to discharge him. Estes v. Lewis and Clark
20 College, 152 Or. App. 372, 381 (1998). A "substantial factor" is
21 one which makes a difference in the discharge decision. Id.

22 Because Kahl has survived summary judgment on his FMLA/OFLA
23 claims, Freightliner is not entitled to summary judgment on the
24 wrongful discharge claim.

25 Conclusion

26 Freightliner's motion for summary judgment (doc. # 29) is
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1 DENIED.

2 IT IS SO ORDERED.

3 Dated this 5th day of April, 2010.

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5 /s/ Dennis James Hubel

6 Dennis James Hubel
7 United States Magistrate Judge
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